SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

NO. 1237

FRANK MILLARD BENSON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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CITATIONS

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28 U.S.C. § 1254(1) 2

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Frank Millard Benson prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this cause on February 16, 1968.

CITATION TO OPINIONS BELOW

The District Court did not render a written opinion. The opinion of the United States Court of Appeals for the Sixth Circuit was filed on February 16, 1968, and has not as of this date been reported. A copy of said opinion is appended hereto as Appendix "A".

JURISDICTION

The judgment sought to be reviewed herein was rendered and entered on February 16, 1968. The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Did the Court err in refusing to grant the defendant a new trial because of improper statements made in the argument of the Assistant United States District Attorney.

STATUTE INVOLVED

The defendant was convicted of a violation of storing a motor vehicle which had been moving as a part of interstate commerce, in violation of 18 U.S.C. Section 2313.

STATEMENT

The indictment contained three counts. The first count charged Benson, Holloway and Smith with concealing the stolen motor vehicle moving in interstate commerce; the second count charged them with receiving it, and the third count charged only Benson with storing it.

The case was tried three times. In the first trial the jury disagreed. The indictment was then dismissed as

to Smith. In the second trial Benson and Holloway were acquitted on counts one and two of the indictment, and Benson was convicted on count three which charged him with storing the stolen motor vehicle.

The present appeal is to review Benson's conviction of the storing offense.

REASON FOR GRANTING WRIT

The Assistant United States Attorney, in his closing argument to the jury, stated:

> "I'd like to have had Mr. Simpson here. Mr. Simpson is, unfortunately can't get here and I—I see he is here now. If I had known he could have told us. I would like to put him on the stand and testify right now but I can't do that, it is too late." (Supplemental transcript.)

During the hearing Benson testified to two matters concerning Mr. Robert Simpson who at the time of the hearing was an Assistant United States Attorney and who had represented Benson at his two former hearings.

One of the matters concerned Mr. Simpson's accompanying Benson to Chattanooga, Tennessee to look for the person from whom he bought the automobile in question. The other matter concerned whether or not Benson had discharged Mr. Simpson as his attorney. (Tr. 255-258.)

The United States Court of Appeals for the Sixth Circuit ruled that because the remarks were not objected to, they could not serve as a basis for reversal unless it was shown that they prejudiced the substantial rights of the defendant-appellant.

The Court cites Judge O'Sullivan in ***United States v. Medlin***, 353 F.2d 789, 795 (6th Cir. 1965), cert. denied

384 U.S. 973, rehearing denied 385 U.S. 889 (1966), as follows:

> "No objection was made to the criticized argument. Unless we are of the view that it was so inflammatory and prejudicial as to be beyond correction by action of the trial judge, we should follow the law that failure to object to the accused argument forecloses its use as a ground for a new trial."

The defendant-appellant submits that the remarks were so inflammatory and prejudicial as to be beyond correction by the trial judge. The jurors had heard the remark and no instruction could have been given by the Court which would have erased the question from the mind of the jurors. The only way the matter could have been cleared up would have been for Mr. Simpson to have testified. He could not have done this. The remark was devastating to the defendant not only because it went to the merits of the case, but mostly because it was damaging to the credibility of the witness. The jurors had to assume from the remark that an Assistant United States Attorney in that court would have testified contrary to the defendant on a very material issue. Such a matter could not have been closed from the minds of the jury merely by an admonishment from the Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

G. EDWARD FRIAR,
1114 West Clinch Avenue,
Knoxville, Tennessee,
Attorney for Petitioner.

CERTIFICATE OF SERVICE

I, G. Edward Friar, counsel for the Petitioner, hereby certify that I have this 16th day of March, 1968, served a true and exact copy of the foregoing petition for a writ of certiorari upon the Solicitor General, Department of Justice, Washington 25, D. C., and J. H. Reddy, United States Attorney, Eastern District of Tennessee, 359 Federal Building, Chattanooga, Tennessee, 37402, by depositing same in the United States Post Office or mail box, with first class postage prepaid, addressed to said counsel at their respective addresses.

G. Edward Friar

G. EDWARD FRIAR

APPENDIX "A"

NO. 17,965

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FRANK MILLARD BENSON,
Defendant-Appellant.

APPEAL from United States District Court for the Eastern District of Tennessee, Northern Division.

Decided February 16, 1968

Before WEICK, Chief Judge, EDWARDS and CELEBREZZE, Circuit Judges.

WEICK, Chief Judge. This is a direct appeal from a judgment of conviction entered upon a jury verdict of guilty of the crime of knowingly storing a stolen motor vehicle which had been moving as a part of interstate commerce, in violation of 18 U.S.C. § 2313. Benson was sentenced to eighteen months' imprisonment.

The indictment contained three counts. The first count charged Benson, Holloway and Smith with concealing the stolen motor vehicle moving in interstate commerce; the second count charged them with receiving it; and the third count charged only Benson with storing it.

Appendix "A"

The case was tried three times. In the first trial the jury disagreed. The indictment was then dismissed as to Smith, as he had been convicted in the same court and sentenced to fifteen years' imprisonment on a counterfeiting charge. In the second trial Benson and Holloway were acquitted on counts one and two of the indictment, and Benson was convicted on count three, which charged him with storing the stolen motor vehicle. On appeal to this Court, the conviction was reversed because of prejudicial error in the cross-examination of a defense character witness. *United States v. Benson*, 369 F. 2d 569 (6th Cir. 1966).

The present appeal is to review Benson's conviction for the storing offense, which conviction occurred upon remand at his third trial. Only errors of law are pointed out in Benson's brief. He does not question the sufficiency of the evidence to support his conviction.

In his instructions to the jury the District Judge, after relating Benson's theory of the case, said:

> "The Government says that that is a story that cannot stand up, that that story was cooked up by the defendant as a defense to this lawsuit and that it is not true."[1]

After the District Judge finished his charge, but before the case was submitted to the jury, the following colloquy took place:

> "MR. FRIAR: . . . The other thing I want to ask the Court about from the charge is in referring

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[1] The Government had offered evidence that Benson bought the stolen automobile from Smith for $1,200., knowing that it had been stolen. Benson claimed that he had obtained the automobile from one, Badger, as security for a $50-loan.

to the defendant's theory of the case. Along toward the end of the charge, the Court said something to this effect, which I wrote down hurriedly, in reference to the defendant's theory of what happened, the Court said something to the effect, quotes 'The Government says that that is a story that was cooked up for this case' unquote.

"I was wondering, if your Honor please, actually no witness and not Mr. Horde nor anybody connected with the Government have made that allegation that that was a story that was cooked up for this case.

"Of course, they contended some other theories but I was wondering, maybe, if the Court could clarify that some way.

"MR. HORDE: I used the expression 'made up' when I was talking on cross-examination.

"THE COURT: Maybe the word 'cooked' wasn't used. Of course, that is the only effect, if the Government, the only effect, but that is just inferences. It is a matter for the jury.

"MR. FRIAR: I was just thinking, if your Honor please, and I don't want to be discussing somatics [sic], but I was thinking the phrase 'cooked up' as a connotation from the Court adds weight to the——

"THE COURT: You want me to say made up?

"MR. FRIAR: That the Government contends that was not true or made up.

"THE COURT: All right. Remind me when the jury comes back and I will say——"

(Rec. pp. 367-368)

Appendix "A"

The jury was recalled and the Court instructed the jury, to conform to defense counsel's request, as follows:

> "THE COURT: Members of the jury, in explaining some of the circumstances relied upon by the Government to show guilt by circumstantial evidence, the Court, among other things, said that the defendant claimed that he advanced $50.00 to this man Badger and took the keys to the Ford automobile as security.
>
> "Now rather than using the words 'cooked up' the Court desires to modify that sentence by eliminating the words 'cooked up' and substitute therefor that the Government simply contends that the contention of the defendant that he advanced this $50.00 to this man Badger and took the car, the keys to the car as security, is not true."
>
> (Rec. p. 369)

Since the Judge did everything he was asked to do by defense counsel, we find no basis for the present complaint of error. Counsel took no objection to the Court's charge.

It is further contended that Benson was prejudiced by improper remarks made by Assistant United States Attorney Horde in his closing arguments to the jury.

In his first and second trials Benson was represented by a lawyer named Simpson, who later became an Assistant United States Attorney. In his direct examination Benson testified that he and his attorney (Simpson) flew to Nashville in an effort to locate Badger, from whom he claims to have obtained the motor vehicle as security for a $50-loan, but that they did not find Badger. On cross-

examination he was asked whether he had fired his attorney, and his answer was 'No.' He stated his understanding was that Simpson and his present lawyer had worked together.

In his closing argument to the jury, the Assistant United States Attorney said:

> "MR. HORDE (Assistant U. S. Attorney): * * *
> "I'd like to have had Mr. Simpson here. Mr. Simpson is, unfortunately can't get here and I— I see he is here now. If I had known he could have told us. I would like to put him on the stand and testify right now but I can't do that, it is too late."

The comment stands in isolation and was not connected in any way with the remainder of the summation. The comment was improper as Benson's first attorney could not have been compelled to testify against his client. The Government did not call the attorney as a witness. Counsel for Benson did not object to the argument. Had he done so, the objection should have been sustained and a sharp reprimand from the Court would have been in order. Benson was represented by a capable lawyer of his own choosing, who had full opportunity to object if he thought that the substantial rights of his client were being adversely affected by the argument. We are not unmindful of the fact that lawyers hesitate to object to an argument because of a possible adverse effect on the jury. For this reason sua sponte action on the part of the Court is sometimes desirable. Neither a motion to strike nor a motion for mistrial was made.

It is clear that unless objection is made to improper remarks in an argument to the jury, such remarks cannot serve as a basis for reversal of a judgment unless it is

shown that they prejudiced the substantial rights of the defendant. See *e.g.*, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 237-240 (1940); *United States v. Aadal*, 368 F. 2d 962, 965 (2nd Cir. 1966), *cert. denied* 386 U.S. 970 (1967); *Findley v. United States*, 362 F. 2d 921, 923 (10th Cir. 1966); *VanNattan v. United States*, 357 F. 2d 161, 163 (10th Cir. 1966); *Forsberg v. United States*, 351 F. 2d 242, 249 (9th Cir. 1965), *cert. denied* 383 U.S. 950 (1966); *United States v. Donovan*, 339 F. 2d 404, 410-411 (7th Cir. 1964), *cert. denied* 380 U.S. 975 (1965); *United States v. Rayborn*, 310 F. 2d 339, 340 (6th Cir. 1962), *cert. denied* 373 U.S. 952 (1963); *Isaacs v. United States*, 301 F. 2d 706, 735-739 (8th Cir.) *cert. denied* 371 U.S. 818 (1962).

As Judge O'Sullivan said in *United States v. Medlin*, 353 F. 2d 789, 795 (6th Cir. 1965), *cert. denied* 384 U.S. 973, *rehearing denied* 385 U.S. 889 (1966):

> "No objection was made to the criticized argument. Unless we are of the view that it was so inflammatory and prejudicial as to be beyond correction by action of the trial judge, we should follow the law that failure to object to the accused argument forecloses its use as a ground for new trial."

In our opinion this is not a case for the application of the plain error rule, as we find no prejudice to Benson's substantial rights. Rule 52(b) Fed. R. Crim. P.

Finally, Benson contends that the Court erred in not giving to the jury a special instruction to charge on the definition of 'storing'.[2]

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[2] The requested special instruction was as follows:
"In a previous trial of this matter, the Court instructed the Jury as follows:

(Continued on following page)

The special request merely asked the Court to define the word 'storing.' It did not contain a definition of that word. The Court complied with the special request by instructing the jury as follows:

> "The words [sic] 'stored' as used in the statute means to place at a place for keeping, preservation or disposal. Another definition is to keep something for future use.
>
> "If you find that the defendant took possession of the automobile described in the indictment knowing that it was stolen and if the automobile was a part of interstate commerce although, as indicated, it was not necessary for the defendant to know that alleged fact before there can be a conviction, and drove it to his home and parked it there, this would be storage within the meaning of the Act."

No objection was made to the Court's charge.

There was evidence that after Benson took possession of the stolen motor vehicle he permitted it to remain in a parking area across the street from his office for about two weeks, and then he drove it to his home and parked it in his driveway for another two weeks before he was arrested.

In our opinion, the definition given by the trial court was adequate. Benson has not suggested any different

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(Continued from preceding page)

" 'And then storing a motor vehicle doesn't require a definition either. If the automobile is taken, if it's placed at a definite location and kept at a definite location then within the meaning of this Statute then it is stored.'

"The Defendant would respectfully request the Court to charge a definition of 'Storing' and would respectfully take the position that the above does not adequately cover the elements contained in the legal requirements for a definition of 'storing' as interpreted by the Courts."

definition, nor has he pointed out any respect in which the definition was inaccurate.

Other points are raised which we have considered, but they do not merit discussion.

Affirmed.

SUPREME COURT, U. S.

FILED

No. 1267

In the Supreme Court of the United States

OCTOBER TERM, 1967

FRANK MILLARD BENSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

FRED M. VINSON, JR.,
Assistant Attorney General,

BEATRICE ROSENBERG,
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Attorneys,
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Washington, D. C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1237

FRANK MILLARD BENSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In a jury trial in the United States District Court for the Eastern District of Tennessee, petitioner was found guilty on count 3 of an indictment charging him with knowingly storing a stolen motor vehicle which had been moving as a part of interstate commerce, in violation of 18 U.S.C. 2313 (R. 1; Tr. 372).[1] On March 21, 1967, he was sentenced to imprisonment for 18 months, to be eligible for parole at such time

[1] "Tr." refers to the transcript of the trial testimony.

as the Board of Parole may determine, as authorized by 18 U.S.C. 4208(a)(2) (R. 31). The court of appeals affirmed the conviction (Pet. App. A).

Since the sufficiency of the evidence is not challenged, the pertinent evidence may be stated briefly. One Smith testified for the government that petitioner bought the stolen Ford automobile from him for $1,200, and that petitioner knew the car had been stolen (Tr. 88-90). Petitioner, on the other hand, testified that he had obtained the automobile from one Badger, as security for a $50 loan he made to Badger (Tr. 225-227, 249-250).

In prior trials under the same indictment, petitioner had been represented by an attorney named Simpson, who later became an Assistant United States Attorney and occupied that position at the time of the present trial. On direct examination petitioner testified that he and Mr. Simpson had flown to Nashville, Tennessee, in an effort to locate Badger, but were unable to find him or to obtain any leads as to his whereabouts (Tr. 234-235). On cross-examination when petitioner was asked if he had not fired his attorney, his answer was "No." Petitioner explained that on the previous appeal it was his understanding that Mr. Friar (petitioner's attorney on the present appeal) and Mr. Simpson were working on the case together (Tr. 255-256).

In his closing argument to the jury, government counsel made the following statement, to which no defense objection was entered (Transcript of jury argument, p. 16):

> * * * I'd like to have had Mr. Simpson here. Mr. Simpson is, unfortunately can't get here and I—I see he is here now. If I had known he could have told us. I would like to put him on the stand and testify right now but I can't do that, it's too late.

Petitioner contends that this statement by government counsel was so inflammatory and prejudicial that it should be deemed plain error under Rule 52 (b), F. R. Crim. P. Counsel's remarks were admittedly improper since Simpson had not been called.[2] However, they cannot serve as a basis for reversal since they did not prejudice petitioner's substantial rights, and the other evidence disclosed a strong case against him. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 237-240; *United States* v. *Aadal*, 368 F.2d 962, 965 (C.A. 2), certiorari denied, 386 U.S. 970; *United States* v. *Donovan*, 339 F.2d 404, 410-411 (C.A. 7), certiorari denied, 380 U.S. 975; *Isaacs* v. *United States*, 301 F.2d 706, 735-739 (C.A. 8), certiorari denied, 371 U.S. 818. Petitioner's experienced trial counsel obviously did not think the challenged remarks were prejudicial at the time they were made, since he made no objection. Government counsel did not state that Mr. Simpson would have contradicted petitioner's testimony that he and Mr. Simpson had flown to Nashville in an unsuc-

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[2] The attorney-client privilege would not necessarily have barred all testimony by Simpson as the court of appeals assumed. Conceivably, he might have engaged in activities not subject to the attorney-client privilege.

cessful attempt to find Badger.[3] Even if the jury had gained that impression, this would hardly have been crucial to petitioner's defense. In addition to petitioner's testimony that he could not find Badger (Tr. 234), there was government testimony by an F.B.I. agent that investigation had failed to disclose Badger's whereabouts (Tr. 217-218). The principal weakness of petitioner's case was the patent incredibility of the Badger story. The jury reasonably refused to believe that a man would post, as collateral for a $50 loan, an automobile worth about $2,600 and then disappear without returning to reclaim it.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

APRIL 1968

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[3] In the context of the government attorney's challenged remarks, any testimony Mr. Simpson might have given on the question as to whether or not he had been dismissed as petitioner's attorney on the previous appeal, would have been on a completely collateral matter not affecting any of petitioner's substantial rights.

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